

Guess Who's Coming to the Bargaining Table?

LEE MODJESKA*

Some years ago Professor Archibald Cox observed that "the law has crossed the threshold into the conference room and now looks over the negotiator's shoulder," and Professor Cox queried whether or not "the next step [is] to take a seat at the bargaining table?"¹ The direction recently taken by the National Labor Relations Board (NLRB), both General Counsel² and Board, makes the question more pertinent and prophetic than ever. The position taken by the NLRB in several recent cases raises fundamental questions concerning the government's role in private collective bargaining negotiations. Governmental overregulation of the process, substance, and content of labor negotiations has hitherto been regarded by Congress and the courts as the antithesis of collective bargaining in a free society. The appropriate governmental role has been viewed essentially as referee in the socioeconomic struggle of bargaining negotiations. The specific decisions made in these recent cases, as well as the philosophic radiations from those decisions, suggest the potentiality for a sharp departure from a tolerant or permissive governmental role. This article neither collates nor harmonizes the precedents but simply raises a narrow yet hopefully significant question concerning a possible shift in national labor policy.

I. GOVERNMENTAL OVERREGULATION OF THE BARGAINING MECHANICS

Governmental overregulation of the procedural mechanics of bargaining negotiations is reflected in recent decisions by the General Counsel and the Board holding that the stenographic transcription or electronic recording of bargaining negotiations is not a mandatory subject of

* Associate Professor of Law, The Ohio State University College of Law.

1. Cox, *The Duty To Bargain In Good Faith*, 71 HARV. L. REV. 1401, 1403 (1958).

2. Section 10(b) of the National Labor Relations Act (NLRA) (29 U.S.C. § 160(b) (1970)), gives the Board or its agent broad discretionary authority concerning the issuance of unfair labor practice complaints. *NLRB v. Indiana & Mich. Elec. Co.*, 318 U.S. 9, 18 (1943). Section 3(d) (29 U.S.C. § 153(d) (1970)) confers this power upon the General Counsel of the Board, and provides that he shall have "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board" See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Saez v. Goslee*, 463 F.2d 214 (1st Cir.), *cert. denied*, 409 U.S. 1024 (1972), and cases there cited. The General Counsel plays a major role not only in the enforcement but also in the formulation and development of national labor policy, and his decisions are thus highly relevant to any meaningful analysis of NLRA doctrine. Further, the General Counsel's refusal to issue a complaint is in fact an adjudication of unfair labor practice claims. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 141, 148 (1975). Recent Freedom of Information Act litigation such as *Sears* has properly resulted in the increased visibility of General Counsel decisions.

bargaining. In one case³ the General Counsel found that the employer violated section 8(a)(5) of the National Labor Relations Act⁴ (the Act) by insisting to the point of impasse that a stenographic reporter be present at contract bargaining negotiations to take verbatim transcriptions of negotiations with no "off-the-record" discussion allowed. The General Counsel authorized issuance of the complaint upon a *per se* theory, namely, that the employer's insistence upon the reporter was in and of itself a refusal to bargain in good faith. In the General Counsel's view, the presence of a stenographer would preclude open and free discussion and would breed distrust between the parties. Further, if bargaining unit employees were to see a verbatim transcript and thus learn the content of frank discussions between the employer and the union, hostilities could thereby be created between the employees and the union. The General Counsel reasoned as follows:

Expert opinion in the field of labor relations is nearly unanimous in condemning the practice of recording bargaining sessions. . . . According to [one] study . . . if they are to be free to communicate the parties in collective bargaining negotiations need to know that what they say will not be turned against them. Imposing a stenographer upon a negotiator who objects to the presence of a stenographer may raise suspicions as to the ultimate use for which the transcript is to be put and, thereby, inject into the bargaining relationship an added basis for mistrust and contention. . . . For example, a union which recognizes that employee work practices are deficient might be reticent to discuss this problem frankly in bargaining if negotiations were recorded, for fear that the employer would seek to capitalize on the hostility that would be engendered between the employees and the union's representatives when the employees read the transcribed remarks of the representatives. Experts have also pointed out that the use of verbatim transcripts tends to make the parties to negotiations "talk for the record" rather than for the purpose of advancing negotiations toward settlement. . . .

While generally disapproving of the use of stenographers during negotiations, experts have noted that the inhibiting effect of such a procedure may be

3. NLRB Gen. Counsel Q. Rep., [1978] 98 LAB. REL. REP. (BNA) 61, 62.

4. Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5) (1970)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees" Section 8(b)(3) (29 U.S.C. § 158(b)(3) (1970)) makes it an unfair labor practice for a union "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of [section 9(a)]." Section 8(b)(3) essentially represents the counterpart of the employer's duty to bargain in good faith under § 8(a)(5). See generally *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960). Section 8(d) of the Act (29 U.S.C. § 158(d) (St pp. V 1975)) defines the duty to bargain collectively to include "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment" Subjects within the § 8(d) definition of "wages, hours, and other terms and conditions of employment" are regarded as mandatory subjects of bargaining about which an employer and union must bargain and upon which either party may insist to the point of impasse. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). See also *Malone v. White Motor Corp.*, 98 S. Ct. 1185 (1978); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964); *Local 24, Teamsters v. Oliver*, 358 U.S. 283 (1959). If the matter involves a permissive rather than a mandatory subject of bargaining the parties are not obligated to bargain about the matter. See *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 183-88 (1971).

lessened to some extent by a liberal policy of going "off the record." . . . However, the Employer in the case under discussion had taken the position that nothing said during negotiations would be "off the record."⁵

One would have thought that the General Counsel's decision was foreclosed by Board precedent. While the Board had indicated its general disapproval of stenographic transcriptions of bargaining negotiations, it had not held that insistence on a transcription was per se unlawful.⁶ Rather, the Board had treated the issue of stenographic transcriptions as a mandatory subject of bargaining upon which either party could insist to the point of impasse, provided the insistence was made in good faith.⁷ While individual Board members had occasionally disagreed with the Board's approach,⁸ there had been no conflict of decisions or uncertainty of precedent. The General Counsel was therefore not presented with a situation in which he was obligated to present the issue to the Board for clarification. It must be conceded, however, that the General Counsel anticipated correctly the fickleness of the Board.

5. NLRB Gen. Counsel Q. Rep., [1978] 98 LAB. REL. REP. (BNA) 61, 63-64.

6. In *Reed & Prince Mfg. Co.*, 96 N.L.R.B. 850, 854 (1951), *enforced*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953), noted by the General Counsel in the above case, the Board stated: This is not the approach usually taken by a participant in collective bargaining negotiations seeking and expecting in good faith to reach an agreement; it is more consistent with the building of a defense to anticipated refusal to bargain charges. The presence of a stenographer at such negotiations is not conducive to the friendly atmosphere so necessary for the successful termination of the negotiations, and it is a practice condemned by experienced persons in the industrial relations field. Indeed, the business world itself frowns upon the practice in any delicate negotiations where it is so necessary for the parties to express themselves freely.

While enforcing the Board's overall finding of bad faith bargaining in *Reed & Prince*, the First Circuit stated, "[W]e are not inclined to agree with the Board that the Company's insistence, over the Union's strenuous objection, on having a stenotypist present at all the bargaining meetings to take down a verbatim transcript of the proceedings was evidence of the Company's bad faith." 205 F.2d at 139.

Thereafter, in *St. Louis Typographical Union No. 8* (Graphic Arts Ass'n of St. Louis, Inc.), 149 N.L.R.B. 750, 751-52 (1964) (footnotes omitted), the Board stated:

[T]he Board's language in *Reed & Prince* regarding the effect of the presence of a stenographer must be read in the context of other evidence of bad faith which was present in that case. In subsequent decisions, the legality of insisting upon a stenographic transcript at bargaining sessions has been determined in the light of the entire bargaining context rather than on a *per se* basis. Similarly, in cases dealing with charges of a refusal to bargain arising from an adamant insistence on other conditions preliminary to actual bargaining, such as the determination of the time or place of bargaining, the Board has avoided establishing rigid standards favoring any particular proposal, but has, rather, attempted to examine each case in terms of whether or not the positions were taken to avoid or frustrate the legal obligation to bargain.

. . . [I]t is clear that respected authorities differ in their opinion of the effect of making a stenographic transcript in collective-bargaining sessions. It is not our intention here either to endorse or condemn the practice of utilizing a stenographer during bargaining negotiations. Rather, in this matter we shall undertake to determine only whether, in assuming its position, the Respondent acted in a manner consistent with the principles of good-faith bargaining required by the Act.

7. *E.g.*, *Architectural Fiberglass*, 165 N.L.R.B. 238, 239 n.8 (1967), and cases cited therein; *Southern Transp., Inc.*, 150 N.L.R.B. 305, 311 (1964) (Brown, Member, concurring), *enforcement denied*, 355 F.2d 978 (8th Cir. 1966); *St. Louis Typographical Union No. 8* (Graphic Arts Ass'n of St. Louis, Inc.), 149 N.L.R.B. 750, 753 (1964) (Fanning & Brown, Members, concurring), and cases cited therein.

8. See cases cited at note 7 *supra*.

In *Bartlett-Collins Co.*,⁹ the full Board agreed with the General Counsel¹⁰ that insistence to impasse upon a court reporter to record bargaining sessions is a per se violation of the Act. The Board said that the issue is not a mandatory subject of bargaining, that "it is irrelevant whether [the employer's] insistence was in good or bad faith,"¹¹ and that prior Board decisions to the contrary are overruled. The Board thus appears to have taken literally and with dispatch the Supreme Court's recent statement in *NLRB v. Local 103, Iron Workers*,¹² that the Board "is not disqualified from changing its mind. . . ."¹³ The serious and longstanding problem of the Board's frequent disregard and overruling of prior decisions is beyond the scope of this article. The problem is of major importance, however, and deserves critical analysis. One is reminded of Justice Robert's observation that the tendency "freely to disregard and to overrule considered decisions and the rules of law announced in them . . . tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only."¹⁴

In *Bartlett-Collins*, the parties negotiated unsuccessfully for several months for a first contract. The Board found, in an earlier decision,¹⁵ that by making proposals during this period that it knew the union could not accept, the employer had engaged in bad faith bargaining designed to undermine the union's representative status. The Board found that the employer thereby violated section 8(a)(5) and (1) of the Act. Thereafter, the parties agreed to resume bargaining. Prior to the first scheduled meeting the employer advised the union that it was making arrangements for a court reporter to record the forthcoming negotiations. The employer believed that the prior Board decision had turned upon credibility resolutions and that a certified court reporter's transcript of negotiations would eliminate misunderstanding or misquoting.¹⁶ The union opposed the presence of a court reporter and suggested that each party record the sessions with its own electronic equipment.¹⁷ The employer rejected the union's alternative proposal and continued to insist upon a court reporter's transcription. The scheduled negotiations were eventually cancelled.

9. 237 N.L.R.B. No. 106, 99 L.R.R.M. 1034 (1978).

10. The names of the parties do not appear in the General Counsel reports, and it is therefore not clear whether or not the Board and General Counsel cases were in fact the same case.

11. 237 N.L.R.B. No. 106, 99 L.R.R.M. at 1036.

12. 434 U.S. 335 (1978).

13. *Id.* at 351.

14. *Smith v. Allwright*, 321 U.S. 649, 666, 669 (1944) (Roberts, J., dissenting).

15. *Bartlett-Collins Co.*, 230 N.L.R.B. No. 18, 96 L.R.R.M. 1581 (1977).

16. The employer told the union that "a record of bargaining under the circumstances is both desirable and necessary to establish without resort to credibility determinations what was said or done by the parties in bargaining." 237 N.L.R.B. No. 106, 99 L.R.R.M. at 1035.

17. The union advised the employer that the presence of a court reporter would interfere with negotiations and frank discussion, and that the bargaining committee would be reluctant to state their views because of their unfamiliarity with judicial or administrative proceedings when stenographic transcripts are made by court reporters. *Id.*

The Board found that the employer's insistence to impasse upon a court reporter's presence as a precondition to negotiations was a per se violation of section 8(a) (5) and (1) "without regard to whether such insistence was in good or bad faith."¹⁸ The Board found that the issue of a court reporter, or alternatively of a recording device, is not a mandatory subject of bargaining because it relates to a "threshold" rather than a "substantive" matter in negotiations.¹⁹ The Board found that labor relations experts believe that the presence of a court reporter interferes with the free and open discussion necessary for successful negotiations. The Board stated that:

The question of whether a court reporter should be present during negotiations is a threshold matter, preliminary and subordinate to substantive negotiations such as are encompassed within the phrase "wages, hours, and other terms and conditions of employment." As it is our statutory responsibility to foster and encourage meaningful collective bargaining, we believe that we would be avoiding that responsibility were we to permit a party to stifle negotiations in their inception over such a threshold issue.²⁰

There is little to commend the General Counsel's and the Board's pursuance of a per se doctrine in this area. Determinations of good or bad faith bargaining based upon per se categorizations of bargaining subjects or tactics have not generally been favored by the Supreme Court.²¹ The preferable approach entails an analysis of whether or not the totality of a party's conduct manifests bad faith.²² There are of course exceptional situations where findings of overall subjective bad faith are not required. Thus, if the conduct is in essence an outright refusal to bargain or a direct obstruction to bargaining or a clear indication of no intention to reach agreement then no such overall evaluation is necessary.²³ The desire of a negotiating party for a transcription of negotiations hardly seems to be so clearly flagrant a situation that it justifies dispensing with an overall good or bad faith analysis.²⁴

The General Counsel and the Board rest their position in large measure upon the proposition that labor relations experts generally

18. 237 N.L.R.B. No. 106, 99 L.R.R.M. at 1036.

19. *Id.* The Board said that the issue does not fall within the § 8(d) categories of "wages, hours, and other terms and conditions of employment" that are mandatory subjects of bargaining. See note 4 *supra*. Rather, said the Board, the issue is a permissive or nonmandatory subject upon which the parties may lawfully bargain but not insist to impasse.

20. 237 N.L.R.B. No. 106, 99 L.R.R.M. at 1036.

21. *E.g.*, NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477 (1960); NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952). *Cf.* American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965) (lockout in support of bargaining position). See also H.K. Porter Co. v. NLRB, 397 U.S. 99, 109 (1970).

22. "Each case must turn upon its particular facts. The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met." NLRB v. Truitt Mfg. Co., 351 U.S. 149, 153-54 (1956). See NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 409-10 (1952).

23. NLRB v. Katz, 369 U.S. 736, 742-43, 747 (1962).

24. Comparative note may be taken of the following observation made by Professor Cox in the context of an analysis of NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956):

condemn the practice of negotiation transcriptions. This appears to be a gross oversimplification of a complex question. The implication of a negotiators' consensus seems most questionable, for experienced negotiators in fact disagree concerning the desirability, utility, and validity of transcribing negotiations. The Board itself had previously recognized that "it is clear that respected authorities differ in their opinion of the effect of making a stenographic transcript in collective-bargaining sessions."²⁵ Professor Gorman has noted:

Labor relations experts have differing opinions as to the propriety of verbatim recording of bargaining sessions, with the proponents asserting that it aids in drafting the contract and in resolving subsequent disputes which turn upon the course of negotiation, and the opponents asserting that it encourages artificially "making a record" rather than candid and conciliatory give and take.²⁶

It is the personal experience of this writer that in real life there can be and are a variety of reasons, not at all inconsistent with good faith bargaining, for desiring a transcription of negotiations.

Areas of frequent controversy can be efficiently and accurately resolved with the availability of a verbatim record of what was said and done during negotiations. The transcription can not only be indispensable to the Board and reviewing courts, as well as labor arbitrators, in the performance of their functions, but, depending upon the particular situation, can be invaluable to one or both of the parties. For example, the Board is routinely required to review and analyze negotiations in detail to determine whether or not the parties reached final agreement,²⁷ or agreed upon a specific provision,²⁸ or insisted upon an illegal condition,²⁹ or waived the right to bargain about a particular subject,³⁰ or engaged in an

Activities which originally were regarded as some evidence of a fact carrying legal consequences - in this case bad faith in a truly subjective sense - often come to be sufficient proof standing alone, thus giving rise to new rules of conduct. The process had taken place, albeit for stronger reasons, in dealing with a refusal to sign a written contract, unilateral action, and withholding wage data. But although this is a way in which law grows, use of the technique ought to depend upon a conscious examination of the underlying questions of policy.

Cox, *supra* note 1, at 1433-34.

25. St. Louis Typographical Union No. 8 (Graphic Arts Ass'n of St. Louis, Inc.), 149 N.L.R.B. 750, 752 (1964).

26. R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 406 (1976). See F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 313 (3d ed. 1973).

27. See, e.g., NLRB v. Painters Local 1385, 334 F.2d 729, 731 (7th Cir. 1964).

28. See, e.g., C & W Lektra Bat Co., 209 N.L.R.B. 1038 (1974), *enforced*, 513 F.2d 200 (6th Cir. 1975); NLRB v. Painters Local 1385, 334 F.2d 729 (7th Cir. 1964).

29. See, e.g., NLRB v. Davison, 318 F.2d 550 (4th Cir. 1963).

30. See The Bunker Hill Co., 208 N.L.R.B. 27 (1973), *modified*, 210 N.L.R.B. 343 (1974); Radioear Corp., 199 N.L.R.B. 1161 (1972); New York Mirror, 151 N.L.R.B. 834 (1965); Tucker Steel Corp., 134 N.L.R.B. 323 (1961); Proctor Mfg. Corp., 131 N.L.R.B. 1166 (1961); The Press Co., 121 N.L.R.B. 976 (1958); Speidel Corp., 120 N.L.R.B. 733 (1958); Jacobus Mfg. Co., 94 N.L.R.B. 1214 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952).

overall course of bad faith bargaining conduct,³¹ or reached an impasse.³² In addition, during the life of the labor contract a myriad of questions arise daily that require interpretation of particular contractual language and that frequently turn upon or require an analysis of bargaining history and the content of negotiations.³³ The Elkouris have observed that:

Precontract negotiations frequently provide a valuable aid in the interpretation of ambiguous provisions. Where the meaning of a term is not clear, it will be deemed, if there is no evidence to the contrary, that the parties intended it to have the same meaning as that given it during the negotiations leading up to the agreement. In such case, consideration will be given to all of the circumstances leading up to the making of the contract.

The arbitrator must place himself, to the extent possible, in the situation of the parties at the time of the negotiations so as to view the circumstances as the parties viewed them and to judge the meaning of the agreement accordingly. In this regard, the arbitrator might make a special request for complete detail as to bargaining history. *Recordings and minutes of bargaining meetings provide important evidence*, and in one case a union's "Negotiations Bulletin" was found to provide a "useful clue" in reference to bargaining history. Even where no stenographic record is kept and no notes are taken, the history of negotiations may be relied upon by the arbitrator if he is satisfied as to the accuracy of the oral testimony of persons who attended the negotiations.³⁴

The ascertainment of the intention of the parties and the reasoned effectuation and enforcement of contractual obligations³⁵ are rather

31. See *NLRB v. General Elec. Co.*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965, *rehearing denied*, 397 U.S. 990 (1970); *White v. NLRB*, 255 F.2d 564 (5th Cir. 1958); *Lloyd A. Fry Roofing Co. v. NLRB*, 216 F.2d 273 (9th Cir. 1954), *amended*, 220 F.2d 432 (9th Cir. 1955); *NLRB v. Reed & Prince Co.*, 205 F.2d 131 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953); *United Engines, Inc.*, 222 N.L.R.B. 50 (1976); *Architectural Fiberglass*, 165 N.L.R.B. 238 (1967); *Kohler Co.*, 128 N.L.R.B. 1062 (1960), *enforced in part, modified and remanded in part*, 300 F.2d 699 (D.C. Cir.), *cert. denied*, 382 U.S. 836 (1962).

32. See, e.g., *Fetzer Television v. NLRB*, 317 F.2d 420 (6th Cir. 1963); *NLRB v. Intracoastal Terminal, Inc.*, 286 F.2d 954 (5th Cir. 1961); *Atlas Tack Corp.*, 226 N.L.R.B. 222 (1976); *Tait Broadcasting Co.*, 163 N.L.R.B. 475 (1967), *enforced*, 395 F.2d 622 (D.C. Cir. 1968). See generally Schatzki, *The Employer's Unilateral Act—A Per Se Violation—Sometimes*, 44 TEXAS L. REV. 470, 495 (1966).

33. See, e.g., *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 423, 424 n. 6 (1967); *California Elec Power Co.*, 21 Lab. Arb. 704, 706 (Grant, 1953); *North Am. Aviation, Inc.*, 19 Lab. Arb. 138, 143 (Komaroff, 1952); *Columbia Steel Co.*, 7 Lab. Arb. 512, 514 (Blumer, 1947); *G. C. Hussey & Co.*, 5 Lab. Arb. 446, 448 (Blair, 1946). See also *Detroit Edison Co.*, 43 Lab. Arb. 193, 200-10 (R. Smith, 1964); *Sidney Wanzer & Sons*, 46 Lab. Arb. 426, 428-29 (Dolnick, 1966); *Los Angeles Herald Examiner*, 45 Lab. Arb. 860, 862 (Kadish, 1965); *Lehigh Portland Cement Co.*, 42 Lab. Arb. 458, 465 (Hebert, 1964); *Kohlenberger Eng'g Corp.*, 12 Lab. Arb. 380, 384 (Prasow, 1949); *Borden's Farm Prod Inc.*, 3 Lab. Arb. 401, 402-03 (Burke, 1945). It should be noted that statements of mediators may be held to be inadmissible privileged communications. *Day Care Council*, 55 Lab. Arb. 1130, 1135 (Glushien, 1970); *Air Reduction Chem. & Carbide Co.*, 41 Lab. Arb. 24, 26 (Warns, 1963).

34. F. ELKOURI & E. ELKOURI, *supra* note 26, at 313 (emphasis added).

35. Note should be taken of the following comments of Dean Harry Shulman:

The parties recognize, when they make their collective agreement, that they may not have anticipated everything and that, in any event, there will be many differences of opinion as to the proper application of its standards. Accordingly the agreement establishes a grievance procedure or machinery for the adjustment of complaints or disputes during its term. The autonomous rule of law thus established contemplates that the disputes will be

fundamental in our jurisprudential scheme; there seems little of substance to justify the NLRB's negative approach to this valuable record of the parties' understandings and intentions. Indeed, Arbitrator James Burke lamented in one case that "[a]s to the history of this [contract] section during the original contract negotiations, it is unfortunate that no stenographic record was kept"³⁶ Intent is one prime but elusive factor in contract analysis and interpretation, and in divining that intent one needs all the help one can muster. If that intent can be found in the record of a particular negotiation, then its revelation should be fostered, not discouraged.

The General Counsel's concern that union-employee relations might suffer were bargaining unit employees to learn the truth about what their bargaining agent says at negotiations is hardly laudable. Under the Act a union as exclusive bargaining representative has a duty to represent all employees in the unit fairly, both in collective bargaining with the employer and in its enforcement of the collective bargaining agreement.³⁷ A union breaches that duty when it acts against a unit employee for arbitrary or discriminatory reasons, or in bad faith.³⁸ In the Board's view the union's duty of fair representation represents an affirmative fiduciary responsibility,³⁹ which includes an obligation of full disclosure.⁴⁰ Fur-

adjusted by the application of reason guided by the light of the contract, rather than by force or power.

Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1007 (1955).

36. *Borden's Farm Prods., Inc.*, 3 Lab. Arb. 401, 402 (1945). See *St. Louis Typographical Union No. 8* (Graphic Arts Ass'n of St. Louis, Inc.), 149 N.L.R.B. 750, 757-59 (1964) (analysis by Trial Examiner Frederick U. Reel).

37. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). See generally Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEXAS L. REV. 1119 (1973); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Modjeska, *The Uncertain Miranda Fuel Doctrine*, 38 OHIO ST. L.J. 807 (1977).

38. In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Court defined the duty as follows: "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177. A breach of the statutory duty of fair representation was said to occur "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190. In *Miranda Fuel Co.*, 140 N.L.R.B. 181, 185 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963), the Board stated that § 7 of the Act "gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment" and that § 8(b)(1)(A) of the Act "accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair."

39. *E.g.*, *General Truck Drivers Local 315* (Rhodes & Jamieson, I. td.), 217 N.L.R.B. 616 (1975), *enforced*, 545 F.2d 1173 (9th Cir. 1976). See also *Phyllis Whitehead*, 224 N.L.R.B. 244 (1976).

40. *Denver Stereotypers Local 13* (Denver Post, Inc.), 231 N.L.R.B. No. 96, 96 I. R.R. M. 1073 (1977); *United Steelworkers* (Duval Corp.), 226 N.L.R.B. 772 (1976); *Local 324, Operating Eng'rs* (Associated Gen. Contractors), 226 N.L.R.B. 587 (1976); *International Bhd. of Teamsters Local 671* (Airborne Freight Corp.), 199 N.L.R.B. 994, 999-1000 (1972); *NLRB v. Local 182, Int'l Bhd. of Teamsters*, 401 F.2d 509, 510 (2d Cir. 1968), *cert. denied*, 394 U.S. 213 (1969), *enforcing*, 156 N.L.R.B. 335 (1965), 169 N.L.R.B. 1143 (1968); *NLRB v. Hotel Employees' Local 568* (Sheraton Corp.), 320 F.2d 254, 258 (3d Cir. 1963); *IUE Local 801 v. NLRB*, 307 F.2d 679 (D.C. Cir.), *cert. denied*, 371 U.S. 936 (1962), *enforcing*, 129 N.L.R.B. 1379 (1961), *amended*, 130 N.L.R.B. 1286 (1961). See also NLRB Gen. Counsel Q. Rep., [1975] LAB. REL. YEARBOOK (BNA) 261.

thermore, the Board has held that a union's deliberate concealment of material facts is clearly inconsistent with the duty of fair representation.⁴¹ The General Counsel's position against full disclosure of contract negotiations appears to be flatly inconsistent with the more stringent requirements of the developing duty of fair representation.

The General Counsel apparently regarded the employer's insistence on a stenographic transcription as especially improper because the proposal seemingly prohibited "off-the-record" remarks. In litigation practice, however, it is not uncommon for judges, hearing officers, or arbitrators to refuse to depart from the record at any time and to insist that all statements made during the course of the proceedings be transcribed on the record. At any rate, if a party has incriminating or sensitive statements to make, legitimately or otherwise, it would seem that the ingenuity of parties and counsel will find nonrecordable channels of communication for such statements.

The foregoing factors reflect that a transcription of the bargaining negotiations is inextricably interwoven with the very contract itself. The transcription becomes an integral part of the interpretation, application, and enforcement of the contract and is thus clearly related to wages, hours, and other employment conditions within the meaning of section 8(d). It can hardly be dismissed as involving a mere "threshold" matter, whatever that means.

The NLRB would thus appear to be shifting toward the application of a heavy regulatory hand to the mechanics of the bargaining process. The intrusion is unwarranted and presupposes that there is commonality to all negotiations as well as a right and wrong way to bargain. Experienced negotiators know better. This heavy hand may be contrasted with the lighter permissive touch applied to bargaining mechanics by the Board only a few months earlier. Thus, in *Axelson, Inc.*⁴² the Board held that the employer violated section 8(a)(5) and (1) of the Act by refusing to pay employee members of the union negotiating committee for time spent in contract negotiations, and by refusing to bargain about the matter with the union. For years the union and the employer had been parties to successive contracts covering the production and maintenance employees, and the union was represented in contract negotiations by a shop committee composed of bargaining unit employees. During past negotiations the employer had paid the shop committee members their regular hourly wages for time lost from production and spent in bargaining sessions.⁴³ In January 1976, during the life of the 1974-1976 contract, the

41. *Pacific Intermountain Express Co.*, 215 N.L.R.B. 588, 598 (1974). See *Warehouse Union Local 860 (The Emporium)*, 236 N.L.R.B. No. 101, 98 L.R.R.M. 1421 (1978).

42. 234 N.L.R.B. No. 49, 97 L.R.R.M. 1234 (1978).

43. The employer paid shop committee members for the 1963, 1965, 1967, 1971, 1973 midterm, and 1974 contract negotiations. The record did not disclose whether or not the negotiators were paid in 1969. *Id.* n.1, 97 L.R.R.M. at 1234 n.1.

parties began negotiations for the 1976-1978 contract. Early in negotiations the employer advised the shop committee members that they would not be paid for production wages lost during negotiations.⁴⁴ The employer also advised the committee that it was willing to negotiate during nonwork time so that committee members would not lose production wages. The union shop committee protested that the employer's action was contrary to the contract⁴⁵ and past practice, but the employer refused to bargain about the matter.

The Board found that remuneration of bargaining committee employees vitally affected the relations between the employer and its employees and was therefore a mandatory subject of bargaining.⁴⁶ The Board found that "[s]uch a matter concerns the relations between an employer and its employees in that it is related to the representation of the members of the bargaining unit in negotiations with an employer over terms and conditions of employment."⁴⁷ The Board further found that

44. Three of the four shop committee members were on the day shift and one was on the night shift. The dispute over negotiation pay for production time lost arose when the committee requested that the night shift member be reassigned to the day shift in order to receive production pay for negotiating time. The employer had previously accommodated a second-shift negotiator by reassigning him to the first shift during negotiations. *Id.*, 97 L.R.R.M. at 1234.

45. The contract provided in part as follows:

6.4 A shop committeeman will, after notice and permission from his immediate supervisor, be allowed to leave his work, if necessary for the following reasons:

.....

(D) To attend negotiation sessions with Company representatives for the purpose of renewing this agreement.

.....

6.5 If it becomes necessary for a . . . committeeman to leave his work, after receiving permission from his immediate supervisor in accordance with Section . . . 6.4 of this article, he must clock-out on his job card and, on his return, clock-in on his job card.

.....

(B) The . . . shop committeeman will receive pay for time so spent when authorized by his supervisor prior to, during, and after normal working hours at his regular straight time hourly rate except on scheduled overtime.

Id., 97 L.R.R.M. at 1234-35.

46. The Board noted its decision in *Operating Eng'rs Local 12 (AGC of Am., Inc.)*, 187 N.L.R.B. 430, 432 (1970) where it defined mandatory subjects of bargaining as those comprised in the phrase "wages, hours, and other terms and conditions of employment" as set forth in Section 8(d) of the Act. While the language is broad, parameters have been established, although not quantified. The touchstone is whether or not the proposed clause sets a term or condition of employment or regulates the relation between the employer and its employees.

The Board rejected the finding of the Administrative Law Judge that the remuneration issue went more to union-employer relations than to employee-employer relations. 234 N.L.R.B. No. 49, 97 L.R.R.M. at 1235.

47. The Board noted its previous rulings that employee remuneration for time spent in the analogous union function of presentation of grievances is a mandatory subject of bargaining. *E.g.*, *American Ship Bldg. Co.*, 226 N.L.R.B. 788 (1976); *Hilton-Davis Chem. Co.*, 185 N.L.R.B. 241, 242-43 (1970); *Bethlehem Steel Co.*, 133 N.L.R.B. 1347 (1961), *supplemental decision*, 136 N.L.R.B. 1500 (1962), *enforcement denied & case remanded*, 320 F.2d 615 (3d Cir. 1963), *cert. denied*, 375 U.S. 984 (1964), *second supplemental decision*, 147 N.L.R.B. 977 (1964). The Board stated:

We see no distinction between an employee's involvement in contract negotiations and involvement in the presentation of grievances. In one situation an employee is implementing a contractual term or condition of employment and in the other situation an employee is attempting to obtain or improve contractual terms or conditions of employment. In both situations the activity is for the benefit of all of the members of the bargaining unit.

234 N.L.R.B. No. 49, 97 L.R.R.M. at 1235.

payment for negotiating time was not only required by the plain meaning of the contract but also was an established past practice. Accordingly, the Board concluded that the employer violated section 8(a)(5) and (1) by refusing to bargain about the payments and by unilaterally ceasing the payments.

The Board's decision in *Axelson* appears to be thoroughly consistent with the evolving concept of mandatory subjects of bargaining.⁴⁸ A matter is within the scope of mandatory bargaining if it directly concerns or regulates relations between the employer and its employees involving subjects within the section 8(d) phrase "wages, hours, and other terms and conditions of employment."⁴⁹ Mandatory bargaining includes subjects within the section 8(d) realm that bear "a close relation to labor's efforts to improve working conditions,"⁵⁰ or that "constitute a subject of immediate and legitimate concern to union members,"⁵¹ or that "vitally affect" the terms and conditions of employment of bargaining unit employees.⁵² These are the relevant analytical questions, not the elusive and essentially subjective distinctions between so-called "threshold" and "substantive" issues applied in *Bartlett-Collins*.

Payment to employees of wages for lost production time spent in bargaining negotiations is clearly within the literal meaning of the section 8(d) phrase "wages." In an immediate sense the payments are virtually by definition directly related to the wages and wage structure of the negotiating committee employees. Further, a preeminent topic of the negotiations themselves is inevitably the issue of bargaining unit wages. In an ultimate sense the issue vitally affects the wages, terms, and conditions of all bargaining unit employees. The payments enable the unit employees through their selected employee representatives to negotiate their funda-

48. Professor Meltzer has commented that the NLRB has tended to expand the bargaining duty in response to "new conditions". . . . The "new conditions" to which the law has responded include the progressive expansion of collective agreements into new areas. That expansion has frequently been independent of direct legal compulsion and has resulted from changing technology, changes in the parties' views as to what subjects should be governed by jointly determined rules, and from the determination of unions to exert economic power to enlarge the area governed by jointly determined standards. Decisions under the NLRA have both reflected and reinforced those institutional tendencies, by expanding the areas included in the subjects of mandatory bargaining.

B. MELTZER, *LABOR LAW CASES, MATERIALS AND PROBLEMS* 724 (2d ed. 1977). As Professor Kathryn Sowle observed some years ago, "expansion has been the primary characteristic of the scope of mandatory bargaining" Comment, *The Duty to Bargain: Bargainable Issues*, 50 Nw. U.L. Rev. 279, 283 (1955).

49. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

50. *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 294 (1959). See *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964). Cf. *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616 (1975). See also *American Fed'n of Musicians v. Carroll*, 391 U.S. 99 (1968).

51. *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 692 (1965). See *United Mine Workers v. Pennington*, 381 U.S. 657, 664 (1965).

52. *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179 (1971). Section 8(d) of the Act, of course, does not immutably fix a list of subjects for mandatory bargaining But it does establish a limitation against which proposed topics must be

mental contract without financial penalty or hardship. The matter thus goes to the very essence of the relationship between the employees and their employer.

The conclusion that negotiation payment for lost production time is a mandatory subject of collective bargaining is "further reinforced by industrial practices in this country."⁵³ As the Supreme Court stated in *Fibreboard Paper Products Corp. v. NLRB*:

While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining. . . . Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process.⁵⁴

The issue of employee compensation for negotiating time is a common topic at the bargaining table, and provisions relating to the matter exist in numerous collective bargaining agreements.

Such questions as whether or not a union will request or an employer will make payments for negotiating time, and when, are frequently delicate and complex questions turning upon a myriad of facts and circumstances in the particular negotiation. Some employers adamantly refuse ever to make such payments, some employers agree at the outset of negotiations to make the payments, and some employers prefer to keep the issue open on the bargaining table as a negotiable item that can sometimes be highly effective in wrapping up a final agreement. It must never be forgotten in any analysis concerning the regulation of collective bargaining negotiations that "[t]he pressure for trade or compromise is ever present."⁵⁵ Moreover, some unions want the employer to pay for negotiating time, some unions prefer to make the payments out of union funds, and some unions prefer to leave the employee negotiators unreimbursed. Many unions recognize that, left open as a negotiable item, the issue is uniquely suitable for effective use by the employer to divide, manipulate, or conquer the employee committee. Either or both of the parties may believe that paid employee negotiators are not conducive to speedy and efficient negotiations because the employees may learn to prefer the comforts of the conference room to the rigors of the production line. The policies, strategies, and politics involved have many variations.⁵⁶ What-

measured. In general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and employees.

Id. at 178.

53. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964).

54. *Id.* See *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 406-07 (1952).

55. Shulman, *supra* note 35, at 1004.

56. See generally R. SMITH, L. MERRIFIELD, & D. ROTHSCHILD, *COLLECTIVE BARGAINING AND LABOR ARBITRATION* 25-45 (1970), and materials there cited.

ever the variations, however, it is clear that the subject matter is a familiar part of the collective bargaining framework, and that the Board quite properly left resolution of the matter to the parties.⁵⁷ So also, absent independent evidence of bad faith, should resolution of bargaining transcriptions be left to resolution by the parties.

II. GOVERNMENTAL OVERREGULATION OF THE BARGAINING CONTENT

Governmental overregulation of the substantive content of bargaining negotiations is reflected in a recent decision by the General Counsel to issue a complaint alleging that a union's proposed successorship clause was not a mandatory subject of bargaining.⁵⁸ During negotiations the union insisted that the following successorship clause be included in the contract:

It is agreed that if the employer sells, assigns, leases or otherwise transfers the control, operation or assets of its business to another person, company, corporation or firm, the employer will require such transferee to assume the obligations of this agreement by specific provision in the agreement to transfer.⁵⁹

The General Counsel noted that the clause was not specifically limited by its terms to a situation in which bargaining unit employees survive a change in ownership. The General Counsel also noted that there was no evidence establishing that the employer had sold its business in the past and that bargaining unit employees had survived the sale. Accordingly, the General Counsel concluded that the clause was not a mandatory subject of bargaining, and that the union violated section 8(b)(3) of the Act by insisting upon the clause.

The General Counsel's determination came before the ink had barely dried on the Board decision in *United Mine Workers (Lone Star Steel Co.)*.⁶⁰ In *Lone Star* the Board held that a virtually identical successorship clause was a mandatory subject of bargaining, and that the union did not violate section 8(b)(3) by insisting to the point of impasse upon its acceptance.⁶¹ The successorship clause provided:

In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be

57. It should be noted that during the Wagner Act debates on the original § 8(5), now § 8(a)(5), Senator Walsh, the Chairman of the Senate Committee on Education and Labor, stated:

When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.

79 CONG. REC. 7660 (1935). See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 104 (1970).

58. NLRB Gen. Counsel Q. Rep., [1978] 98 LAB. REL. REP. (BNA), 61, 66.

59. *Id.*

60. 231 N.L.R.B. No. 88, 96 L.R.R.M. 1083 (1977).

61. Member Walther dissented in part. *Id.*, 96 L.R.R.M. at 1087.

sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement.⁶²

The Board found that the clause vitally affected the interests of the bargaining unit employees. The Board noted that the general rules governing successorship do not guarantee either wages or jobs,⁶³ and that a successor's assumption of the predecessor's collective bargaining agreement would therefore be "vital to the protection of [the bargaining unit] employees' previously negotiated wages and working conditions"⁶⁴ In the Board's view, the clause would "assure the survival of the fruits of collective bargaining" and "would vitally affect the terms and conditions of employment of the miners who survive such a change in ownership."⁶⁵

The Board also found in *Lone Star* that the successorship clause did not come within the proscriptions of section 8(e) of the Act,⁶⁶ and that the union did not violate section 8(b)(4)(A)⁶⁷ by striking to compel the employer to agree to the clause. The Board found that the transactions contemplated by the successorship clause, namely, the sale or transfer of the business entity, were not "doing business" within the meaning of the "cease doing business with any other person" language of section 8(c). The sale or transfer of a separate business entity, said the Board, is not "doing business" within section 8(e), but rather is the substitution of one entity for another while the conduct of the business itself continues without interruption. Stated differently, upon the sale or transfer, the separate

62. *Id.*, 96 L.R.R.M. at 1085.

63. *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272 (1972) held that a successor employer is not bound by operation of law to the predecessor's labor contract. When a majority of the successor's workforce is comprised of the predecessor's employees, however, and when there is substantial continuity in the employing or business enterprise, the successor may be obligated to bargain with the predecessor union. *Id.* In particular situations the successor employer may also be barred from making unilateral changes from the predecessor's employment terms. *Spitzer Akron, Inc.*, 219 N.L.R.B. 20 (1975). *United Maintenance & Mfg. Co.*, 214 N.L.R.B. 529 (1974); *Spruce Up Corp.*, 209 N.L.R.B. 194 (1974). See *Machinists v. NLRB*, 98 L.R.R.M. 2787 (D.C. Cir. 1978), and cases there cited. The successor employer may further be required to arbitrate various matters arising under the predecessor's contract. *Wiley and Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). See also *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249 (1974); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). See generally *Goldberg, The Labor Law Obligations of a Successor Employer*, 63 NW. U. L. REV. 735 (1969); R. GORMAN, *supra* note 26, at 116-31, 575-83; *Morris & Gaus, Successorship and the Collective Bargaining Agreement: Accommodating Wiley and Burns*, 59 VA. L. REV. 1359 (1973).

64. 231 N.L.R.B. No. 88, 96 L.R.R.M. at 1087.

65. *Id.*

66. Section 8(e) provides in part that:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void

29 U.S.C. § 158(e) (1970).

67. Sections 8(b)(4)(i) and 8(b)(4)(ii)(A) make it an unfair labor practice for a union to engage in proscribed conduct such as strikes, threats or coercion to force an employer to enter into any agreement prohibited by § 8(e). 29 U.S.C. §§ 158(b)(4)(i) & 158(b)(4)(ii)(A) (1970).

business enterprise survives and continues despite the formal change in ownership. The separate entities remain and continue in the same basic employing industry without any disruption in the normal business relationships between the successor and the predecessor's suppliers and customers.

In concluding that the mine operation in *Lone Star* was a separate entity that would probably continue in the event of a sale or transfer, thus creating a substitution of business entities rather than a disruption of normal business relationships, the Board noted that based upon past experience it was likely that the mine employees would continue in their jobs. That is, the separate cadre of employees indicated the separateness of the business enterprise. The General Counsel distinguished *Lone Star* on the ground that these elements of probable continuation were lacking in the subsequent case under consideration. With regard to the successorship clause in the later case the General Counsel stated that unlike *Lone Star*:

The clause was not limited to applicability to situations where there are unit employees who have survived a sale of the business. And, so far as the evidence showed, there was no history of unit employees having survived a sale of the business. We considered these facts significant. Had they been different, arguably, the successorship clause might have been viewed as protecting unit employees and, therefore, a mandatory subject of bargaining.⁶⁸

The threshold difficulty with the General Counsel's rationale is that in *Lone Star* the Board regarded the probable continuation elements as relevant not to the section 8(b)(3) mandatory bargaining subject analysis but rather to the section 8(b)(4) analysis. As noted above, the Board relied upon those factors to buttress its finding that the situation involved a substitution of separate business entities rather than a cease doing business object proscribed by section 8(b)(4). The Board in no way indicated that these factors were relevant to its finding that the successorship clause was a mandatory subject of bargaining. On the contrary, the Board's decision in *Lone Star* that the successorship clause was a mandatory subject of bargaining was predicated squarely on the general proposition that a successor's assumption of the predecessor's labor contract "would be vital to the protection of [the predecessor] employees' previously negotiated wages and working conditions"⁶⁹ The Board found that

the Union's insistence upon including in any agreement reached a provision which would assure the survival of the fruits of collective bargaining, in the event *Lone Star* thereafter should dispose of the *Starlight* mine, is not violative of the Act, as agreement in this regard would vitally affect the terms and conditions of employment of the miners who survive such a change in ownership.⁷⁰

68. NLRB Gen. Counsel Q. Rep. [1978] LAB. REL. REP. (BNA) 61, 66-67.

69. 231 N.L.R.B. No. 88, 96 L.R.R.M. at 1087.

70. *Id.*

The focal point of the Board's analysis was the legitimate interests of the bargaining unit employees in seeking to protect their jobs and employment conditions in the event of the sale of the business as a continuing enterprise, not upon the likelihood of their being retained by a successor in the event of such sale. The Board did not suggest that successorship must first be found as a matter of law before the clause could become operative.⁷¹ Indeed, in many situations the effect of the clause will be to ensure the retention of the predecessor's employees by the successor, obviously one of the primary purposes of the clause.⁷² Compliance with the clause could thus sometimes create a legal successorship, but the Board did not say, as does the General Counsel, in effect, that legal successorship is a prerequisite to the clause's validity. Indeed, the touchstone of the Board's holding in *Lone Star* was its recognition of the fact that "the general rules governing successorship guarantee neither employees' wages nor their jobs."⁷³

To permit a union to try to secure through collective bargaining some meaningful job protection in the event of sale or transfer is not inconsistent with national labor policy concerning successorship. *NLRB v. Burns International Security Services, Inc.*⁷⁴ held that a successor employer is not

71. The complex rules for the determination of successorship were succinctly summarized as follows by the Board in *Mondovi Foods Corp.*, 235 N.L.R.B. No. 135, 98 L.R.R.M. 1102, 1103-04 (1978) (footnotes omitted):

When all or part of a business is sold, certain legal obligations of the seller devolve upon the purchaser. Where there is substantial continuity in the identity of the employing enterprise, one such obligation will be that of the employer to recognize and bargain with a union which represents the former owner's employees. However, if in the course of the transfer, there have been substantial and material changes in the employing enterprise, the new employer will not be found to have succeeded to the bargaining obligation of the former employer.

In cases involving the successorship issue, the Board's key consideration is "whether it may reasonably be assumed that, as a result of transitional changes, the employees' desires concerning unionization [have] likely changed." [citing *Ranch-Way, Inc.*, 183 N.L.R.B. 1168, 1169 (1970)]. The Board considers a variety of factors in determining whether the new employer has succeeded to the former employer's bargaining obligation. Certainly a prime factor is whether the purchaser has hired a sufficient number of former employees of the seller to constitute a majority of the employee complement of the appropriate unit. Once it has been found that the purchaser has hired such a majority, the Board considers such circumstances as whether or not there has been a long hiatus in resuming operations. Hiatus is a significant factor because, as it lengthens, employees' expectations of hire by the purchaser diminish. Change of location may have a similar result, in proportion to the distance from the prior location. Changes in product line or market can be indicative of a different type of business (e.g., different or altered production machinery necessitating retraining and/or different skills). However, a change in scale of operation must be extreme before it will alter a finding of successorship.

72. In *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 294-95 (1972), the Court stated: Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by § 9(a) of the Act.

73. 231 N.L.R.B. No. 88, 96 L.R.R.M. at 1087.

74. 406 U.S. 272 (1972). See discussion at note 51 *supra*.

bound by operation of law to the predecessor's labor contract. *Burns* does not hold, however, that negotiated agreements limiting the conditions under which the predecessor can sell are invalid. As the Board stated in *Lone Star*:

[*Burns*] is inapposite here, however, inasmuch as it dealt with the question of whether a successor's freedom was restricted by operation of law (i.e., whether a successor was automatically bound to the terms of a preexisting agreement), whereas the issue herein is whether voluntary restrictions upon the freedom of the predecessor (the seller) may be insisted upon by a union. We are not considering or passing upon the issues of whether a union may lawfully act to compel compliance with such a provision or whether a successor employer would be bound by the terms of such an agreement.⁷⁵

Both the literal language and rationale of *Lone Star*, as well as the policy underlying the Board's decision, would seem to have precluded the General Counsel's issuance of further complaints over the same class of successorship clauses. Further litigation creates not only unnecessary burdens and expenses for the parties but also general confusion and uncertainty concerning the governing legal rules. It is beyond cavil that the General Counsel has wide discretion concerning the issuance of complaints,⁷⁶ and that clarification of uncertain areas is a proper exercise of that discretion. It just seems that no such need for clarification existed here, and that the entire new exercise was not appropriate. One must concede, however, that in light of such phenomena as the *Bartlett-Collins* shift anything can happen, and the Board may well be prepared to apply a heavier regulatory hand to the bargaining content as well as the mechanics.

There are aspects of the General Counsel's determination that are more troublesome than the foregoing questions concerning the interpretation and application of specific precedent in a specific case. The radiations from the General Counsel's approach again raise fundamental questions about the NLRB's philosophy and conceptualization of the government's role and function in the collective bargaining process.

One aspect is that the General Counsel found that the successorship clause was not a mandatory subject of bargaining because the clause "was not limited to applicability to situations where there are unit employees who have survived a sale of the business."⁷⁷ The difficulty with this approach is that the finding of a violation is predicated upon the failure of the union to disclaim an illegitimate objective, rather than upon factual evidence that the clause was used unlawfully.⁷⁸ The approach borders

75. 231 N.L.R.B. No. 88 n.13, 96 L.R.R.M. at 1087 n.13.

76. See note 2 *supra*. Cf. Southern Cal. Dist. Council of Laborers, Local 1184 v. Ordman, 318 F. Supp. 633, 636 (C. D. Cal. 1970) (federal court may review the General Counsel's determination of "a purely legal question, distinguishable from questions of administrative policy requiring the special expertise of the General Counsel.").

77. NLRB Gen. Counsel Q. Rep., [1978] 98 LAB. REL. REP. (BNA) 61, 66-67.

78. See Local 60, Carpenters v. NLRB, 365 U.S. 651, 653-56 (1961).

upon or in fact embodies a virtual presumption of illegality. Indulgence in such presumptions in the general area of legitimate labor-management activity has been rejected by the Supreme Court. As the Court admonished in *Local 357, Teamsters v. NLRB*,⁷⁹ the NLRB "cannot assume that a union conducts its operations in violation of law" The Court reemphasized the principle in *NLRB v. News Syndicate Co.*⁸⁰ stating "we will not assume that unions and employers will violate the federal law" In *News Syndicate* the Court endorsed the Second Circuit's ruling that "[i]n the absence of provisions calling explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives."⁸¹ As stated by Justice Powell, "The parties cannot agree to terms that violate the law, but the remedy that is generally applied is post-execution invalidation and assessment of damages, rather than 'official compulsion over the actual terms of the contract.'"⁸²

Another troublesome aspect of the General Counsel's approach is that, as with *Bartlett-Collins*, it again sounds in governmental overregulation of the collective bargaining process. It is one thing to chart general areas of mandatory, permissive, and illegal subjects of bargaining in order to make the bargaining process viable.⁸³ This is clearly part of the NLRB's proper function.⁸⁴ It is a different matter, however, to engage in hyper-technical categorizations of bargaining subjects that treat each new entry into the bargaining field negatively and, in effect, with a presumption of nonmandatoriness. This latter approach treats mandatory bargaining subjects as some grudging exceptions to a collective bargaining philosophy that discourages impasse situations resolvable by the economic strength of the parties.⁸⁵ Our national labor policy does not embody such a pristine

79. 365 U.S. 667, 676 (1961).

80. 365 U.S. 695, 699 (1961).

81. *NLRB v. News Syndicate Co.*, 279 F.2d 323, 330 (2d Cir. 1960), *aff'd*, 365 U.S. 695 (1961). See also *Paragon Prods. Corp.*, 134 N.L.R.B. 662 (1961).

82. *Federal Maritime Comm'n v. Pacific Maritime Comm'n*, 98 S. Ct. 927, 944 (1978) (Powell, J., joined by Brennan & Marshall, J. J., dissenting) (*quoting* *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107-08 (1970)).

83. In *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 486 (1960) the Court noted: "Obviously there is tension between the principle that the parties need not contract on any specific terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground."

84. See generally *Cox & Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 391-401 (1950).

85. As Professors Summers and Wellington have pointed out:

The determination that [a subject] is a mandatory subject of bargaining has two consequences. First, the employer can not make unilateral changes without bargaining to impasse. Second, the union can use economic force to influence his decisions. The boundaries of mandatory subjects of bargaining mark both the outer limits of the legal duty to discuss and the outer limits of the use of economic force. Neither the employer nor the union can use economic force to compel agreement on a matter which is not a mandatory subject of bargaining.

C. SUMMERS & H. WELLINGTON, CASES AND MATERIALS ON LABOR LAW 32 (1968).

philosophy. On the contrary, the Supreme Court pointed out in *NLRB v. Insurance Agents' International Union*⁸⁶ that:

It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth or even with what might be thought to be the ideal of one. The parties even granting the modification of views that may come from a realization of economic interdependence still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms exist side by side. . . .

. . . [T]he use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining.

A further troublesome aspect of this approach, which is in reality a variation subsumed in the foregoing, is the degree to which the government thereby intrudes upon the strong national labor policy in favor of the fullest possible freedom of contract.⁸⁷ The Supreme Court has repeatedly affirmed the essential proposition that freedom of contract is a bedrock principle embodied in the NLRA. In *H. K. Porter Co. v. NLRB*⁸⁸ the Court stated that the "fundamental premise on which the Act is based" is "private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract."⁸⁹ In *NLRB v. American National Insurance Co.*⁹⁰ the Court

86. 361 U.S. 477, 488-89, 495 (1960).

87. See generally Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. PA. L. REV. 467 (1964). Professor Kathryn Sowle has noted that it is a "maxim in labor law that the government should not interfere with the terms of dispute settlement" and that "this policy is considered by both management and labor as vital to their relations." Comment, *supra* note 48, at 286 & n.51.

88. 397 U.S. 99, 108 (1970). "It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *Id.* at 107-08.

89. "The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract." *Id.* See *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 282-87 (1972).

90. 343 U.S. 395, 404 (1952).

stated that it was "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."⁹¹ In *NLRB v. Insurance Agents' International Union*,⁹² the Court said: "Our labor policy is not presently erected on a foundation of government control of the results of negotiations."⁹³ And in *Local 24, Teamsters v. Oliver*⁹⁴ the Court stated: "Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed. . . . The purposes of the Acts are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves."⁹⁵

The General Counsel's *modus vivendi* reflected in this recent case constitutes a substantial encroachment upon the contractual freedom of the parties envisaged in the foregoing precepts. A question such as whether or not a contract should contain a successorship clause is, in short, "an issue for determination across the bargaining table, not by the Board."⁹⁶ As Professor Cox cautioned some years ago, "The principles determining legal rights and duties under a collective bargaining agree-

91. See *Terminal R.R. Ass'n v. Trainmen*, 318 U.S. 1, 6 (1943):

The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulations of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions.

92. 361 U.S. 477, 490 (1960).

93. The Court said further:

[I]t remains clear that § 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements. . . .

. . . . It is apparent from the legislative history of the whole Act that the policy of Congress is to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement, in the belief that such an approach from both sides of the table promotes the overall design of achieving industrial peace. See *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45. Discussion conducted under that standard of good faith may narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement through give and take. The mainstream of cases before the Board and in the courts reviewing its orders, under the provisions fixing the duty to bargain collectively, is concerned with insuring that the parties approach the bargaining table with this attitude. But apart from this essential standard of conduct, Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences.

Id. at 487-88.

94. 358 U.S. 283, 295 (1959).

95. See *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 676-77 (1961). "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

96. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 409 (1952). See *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667, 676-77 (1961).

ment should not be imposed from above; they should be drawn out of the institutions of labor relations and shaped to their needs."⁹⁷

The Board's recent decision in *Elizabethtown Water Co.*⁹⁸ stands in sharp contrast to the General Counsel's restrictive approach toward identification of mandatory subjects of bargaining. The case, as with the Board's decisions in *Axelson* and *Lone Star* and of course unlike its decision in *Bartlett-Collins*, reflects an expansive Board philosophy that envisages bargaining resolution by the parties of the widest possible range of matters related to the employer-employee relationship. The philosophy favors inclusion rather than exclusion of matters from mandatory bargaining.

In *Elizabethtown Water Co.* the Board found that the employer violated section 8(a)(5) and (1) of the Act by refusing to bargain with the union concerning a retirement plan that had expired during the life of the parties' collective bargaining agreement. The most recent agreement between the parties was effective from February 1, 1976 until January 31, 1978. The agreement specifically provided for and incorporated a retirement plan⁹⁹ and provided that the plan "shall not be subject to change prior to February 1, 1977."¹⁰⁰ The union submitted no demands concerning the retirement plan during the negotiations for the current agreement, nor did the parties discuss whether or not plan and contract negotiations should occur simultaneously in the future. Further, the union submitted no demand that the employer agree to bargain during the contract term. On September 21, 1976, and at various times thereafter, continuing until April 1977, the union requested that the employer bargain regarding the plan. The employer refused, contending that it was not obligated to bargain about any contract provision, including the plan, until expiration of the contract. The employer further contended that the union had waived its right to bargain about the plan during the contract term by failing during negotiations to request a change in the 1977 plan reopener provisions of Article XXV. The Board rejected the employer's contentions and held that the employer's refusal to bargain was unlawful.

97. Cox, *Rights Under A Labor Agreement*, 69 HARV. L. REV. 601, 605 (1956).

98. 234 N.L.R.B. No. 68, 97 L.R.R.M. 1488 (1978).

99. Article XXV of the agreement provided:

Employees will be granted retirement benefits in accordance with a formal retirement plan known as the "Employee's Retirement Plan of Elizabethtown Water Company" dated September 1, 1965 (as revised through February 1, 1973) as described in a separate booklet which will be given to each employee. The provisions of said plan, as revised through February 1, 1973, shall not be subject to change prior to February 1, 1977.

Id., 97 L.R.R.M. at 1488-89.

100. *Id.* Prior to 1973 the expiration dates of the agreement and plan were coterminous in various agreements between the parties. During negotiations for the 1973 contract the parties agreed on the language of Article XXV, *supra* note 99, before reaching agreement on the contract's duration. The parties thereafter agreed on a one-year contract, effective from February 1, 1973 until January 31, 1974. The durational terms of the contract and plan thus became different. The succeeding contract was effective from February 1, 1974 until January 31, 1976, with the expiration date of the plan thus one year later.

The Board found that the retirement plan was a mandatory subject of bargaining¹⁰¹ and that "[a]n employer must bargain during the existence of a bargaining agreement in regard to a mandatory subject of bargaining not specifically covered by the contract or unequivocally waived by the union, regardless of whether the contract contains a reopener clause."¹⁰² The Board found that while Article XXV of the agreement provided that the plan would remain in effect for a specified term (until 1977), the agreement did not expressly or impliedly forbid negotiations during that term.¹⁰³ The Board noted that the contract did not reflect any understanding between the parties whether or not, or on what terms, the plan would be continued beyond February 1, 1977, and that the parties did not discuss any matters concerning the plan during negotiations. The Board noted further that it would have been premature for the parties to have bargained about the plan during the 1976 negotiations because the parties had previously agreed not to change the plan until 1977.

The Board found further that the union had not waived its right to bargain about the plan during the life of the contract. The Board said that failure to raise the issue during negotiations did not constitute a waiver of the right to bargain over a mandatory subject because waiver requires a conscious relinquishment, clearly intended and expressed.¹⁰⁴ The Board found no such clear relinquishment by the union concerning the plan.¹⁰⁵

As a technical matter, the Board's decision appears to be inconsistent with the provisions of section 8(d) that purport to relieve a party from midterm bargaining concerning matters contained in the contract. Section 8(d) provides that:

[T]he duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before

101. A retirement plan is considered a term or condition of employment within the meaning of § 8(d). See *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

102. 234 N.L.R.B. No. 68, 97 L.R.R.M. at 1489.

103. The Board distinguished *Nevada Cement Co.*, 181 N.L.R.B. 738 (1970), as a situation in which the contract forbids alterations, modifications or termination during the contract term.

104. Determination of whether or not a party has waived its right to bargain by express agreement (e.g., a "zipper" clause), bargaining history, or inaction is a complex question. E.g., *NLRB v. Auto Crane Co.*, 536 F.2d 310 (10th Cir. 1976); *Medicenter, Med-South Hosp.*, 221 N.L.R.B. 670 (1975); *Radioear Corp.*, 214 N.L.R.B. 362 (1974), *supplementing*, 199 N.L.R.B. 1161 (1972); *ITP Corp.*, 190 N.L.R.B. 240 (1971); *New York Mirror*, 151 N.L.R.B. 334 (1965); *Ador Corp.*, 150 N.L.R.B. 1658 (1965); *C & C Plywood Corp.*, 148 N.L.R.B. 414 (1964), *enforcement denied*, 351 F.2d 224 (9th Cir. 1965), *rev'd & remanded*, 385 U.S. 421 (1967); *Perkins Mach. Co.*, 141 N.L.R.B. 98 (1963). See generally R. GORMAN, *supra* note 26, at 466-80.

105. The Board stated:

Although . . . the history of collective bargaining between the parties did not include midterm bargaining, the Union was not thereby obligated to request in 1976 a provision which would allow bargaining concerning the Plan in 1977. Rather, since neither party sought to bargain with respect to providing a mechanism whereby bargaining could occur when the Plan became subject to change, and since the Agreement does not reflect any understanding on the provisions under which a retirement plan may operate after February 1, 1977, we find that the Union did not clearly relinquish and thereby waive its statutory right to bargain about the Plan.

234 N.L.R.B. No. 68, 97 L.R.R.M. at 1490.

such terms and conditions can be reopened under the provisions of the contract.¹⁰⁶

Interpreting this provision in *Jacobs Manufacturing Co.*,¹⁰⁷ the Board established the principles that parties need not engage in midterm bargaining regarding matters contained in the contract, but that absent waiver they must bargain regarding matters neither contained in the contract nor discussed in negotiations.¹⁰⁸

Once it was determined, as the Board seems to have done here, that the plan was incorporated into and part of the contract, then *Jacobs* would appear to dictate that the employer was not obligated to bargain about the plan during the life of the contract. Conversely, if the Board had found that the plan was neither contained in the contract nor discussed during negotiations, then *Jacobs* would seem to dictate that the employer was required to bargain about the plan.¹⁰⁹

The Board applied neither of the foregoing analyses, however, but rather blended both sides of the *Jacobs* doctrine into a broad, albeit confusing, holding¹¹⁰ that again reflects a philosophy that only the clearest and strongest considerations will remove a matter from the bargaining table. For the Board concluded that while the plan was contained in the contract the employer nevertheless was obligated to engage in midterm bargaining because the contract did not expressly or impliedly forbid such bargaining. Resolution of midterm bargaining obligations under *Jacobs* turns essentially upon whether or not the particular matter is contained in the contract. The element of containment becomes the touchstone for resolution of the underlying question of whether or not the parties

106. 29 U.S.C. § 158(d) (Supp. V 1975).

107. 94 N.L.R.B. 1214 (1951), *enforced*, 196 F.2d 680 (2d Cir. 1952). See *NLRB v. Niles-Bement-Pond Co.*, 199 F.2d 713 (2d Cir. 1952); *Proctor Mfg. Corp.*, 131 N.L.R.B. 1166 (1961).

108. For exploration of the various considerations entailed in *Jacobs*-type situations, see Cox & Dunlop, *supra* note 84, at 391-401; Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097 (1950); Findling & Colby, *Regulation of Collective Bargaining by the National Labor Relations Board—Another View*, 51 COLUM. L. REV. 170 (1951). See also Wollett, *The Duty to Bargain Over the "Unwritten" Terms and Conditions of Employment*, 36 TEXAS L. REV. 863 (1958). Concerning the interrelationship of strikes over midterm bargaining for contract modification of termination and notice requirements of § 8(d), see *NLRB v. Lion Oil Co.*, 352 U.S. 283 (1957); *Local 9735, UMW v. NLRB*, 258 F.2d 146 (D.C. Cir. 1958). See also *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *NLRB v. Knight Morley Corp.*, 251 F.2d 753 (6th Cir. 1957), *cert. denied*, 357 U.S. 927 (1958).

109. If the matter involves a permissive rather than a mandatory subject of bargaining not only are the parties not obligated to engage in midterm or other bargaining, but also unilateral midterm modification of the permissive term is not violative of § 8(d). *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 183-88 (1971).

110. The situation confronting the parties appeared to be novel to their relationship and may well have posed potentially serious problems concerning the status of the plan for the duration of the contract. The Board did not, however, approach the case as *suigeneris*. Thus, for example, the Board did not limit its holding to that of a novel situation beyond the contemplation or presumed intent of the parties, nor to a situation warranting equitable relief for a mutual mistake. Rather, without discussion or even citation of *Jacobs* the Board found that a party must engage in midterm bargaining over a contained term because the contract did not expressly forbid such bargaining. 234 N.L.R.B. No. 68, 97 L.R.R.M. at 1489-90.

intended to settle the particular matter for the life of the contract. Imposing an added requirement that the contract specifically forbid bargaining about the particular matter adds a whole new dimension to the *Jacobs* analysis and clearly favors resolution of matters by collective bargaining rather than by default or governmental fiat under hypertechnical rules.

CONCLUSION

The foregoing analysis suggests slight movements by the NLRB toward increased governmental regulation of the collective bargaining process. The movements may, in Mr. Justice Holmes' words, be interstitial and "confined from molar to molecular motions."¹¹¹ Or a wind may be rising, in which event we may wish to know our direction.

111. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).